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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CITY OF AKRON,

Petitioner,

v.

AKRON CENTER FOR REPRODUCTIVE HEALTH, INC., *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR *AMICUS CURIAE* AMERICAN PSYCHOLOGICAL ASSOCIATION IN SUPPORT OF RESPONDENTS

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BRIEF FOR *AMICUS CURIAE* AMERICAN PSYCHOLOGICAL ASSOCIATION IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICUS CURIAE*

The American Psychological Association (APA), a nonprofit scientific and professional organization founded in 1892, is the major association of psychologists in the United States. The APA has more than 55,000 members, and includes the vast majority of psychologists holding doctoral degrees from accredited universites in the United States. The purpose of the APA, as set forth in its by-laws, is to "advance psychology as a science and profession, and as a means of promoting human welfare by the encouragement of psychology in all branches in the broadest and most liberal manner." A substantial and growing number of APA's member psychologists are health-care

providers licensed to provide mental health services to individual clients.

Since 1948, one of APA's major functions has been to accredit doctoral programs in professional psychology. Another of APA's central functions is to establish ethical standards and guidelines for the delivery of psychological services. The Ethical Principles of Psychologists have been incorporated in the laws of most states, thus governing the professional conduct of psychologists licensed in those states.

This case raises the questions of what information should be communicated to pregnant women, and by whom, in the context of pre-abortion counseling. These questions are of particular interest to psychologists because counseling is one of the four recognized specialty areas of professional psychology, and because psychologists would effectively be precluded, under the Akron Ordinance at issue here, from providing pre-abortion counseling.

The APA submits this *amicus brief* in order to bring to the Court's attention relevant professional standards and empirical studies that will not be addressed by the parties.

The APA has frequently participated as an *amicus* in this Court, most recently in *Blue Shield of Virginia v. McCready*, —— U.S. ——, 102 S.Ct. 2540 (1982); and in *Youngberg v. Romeo*, —— U.S. ——, 102 S.Ct. 2452 (1982).

The parties have consented to the filing of this Brief. Their letters of consent have been filed with the Clerk of the Court.

ORDINANCE INVOLVED

Ordinance No. 160-1978, amending Chapter 1870 of the Codified Ordinances of the City of Akron, Ohio, 1975, was adopted by a seven to six vote of the City Council

of Akron, Ohio on February 28, 1978. It will be referred to herein as the "Akron Ordinance." Section 1870.06 of the Akron Ordinance, which is the only section addressed in this *amicus* brief, provides as follows:

> 1870.06 INFORMED CONSENT
>
> (A) An abortion otherwise permitted by law shall be performed or induced only with the informed written consent of the pregnant woman, and one of her parents or her legal guardian whose consent is required in accordance with Section 1870.05(B) of this Chapter, given freely and without coercion.
>
> (B) In order to insure that the consent for an abortion is truly informed consent, an abortion shall be performed or induced upon a pregnant woman only after she, and one of her parents or her legal guardian whose consent is required in accordance with Section 1870.05(B) of this Chapter, have been orally informed by her attending physician of the following facts, and have signed a consent form acknowledging that she, and the parent or legal guardian where applicable, have been informed as follows:
>
> (1) That according to the best judgment of her attending physician she is pregnant.
>
> (2) The number of weeks elapsed from the probable time of the conception of her unborn child, based upon the information provided by her as to the time of her last menstrual period or after a history and physical examination and appropriate laboratory tests.
>
> (3) That the unborn child is a human life from the moment of conception and that there has been described in detail the anatomical and physiological characteristics of the particular unborn child at the gestational point of development at which time the abortion is to be performed, including, but not limited to, appearance, mobility, tactile sensitivity, including pain,

perception or response, brain and heart function, the presence of internal organs and the presence of external members.

(4) That her unborn child may be viable, and thus capable of surviving outside of her womb, if more than twenty-two (22) weeks have elapsed from the time of conception, and that her attending physician has a legal obligation to take all reasonable steps to preserve the life and health of her viable unborn child during the abortion.

(5) That abortion is a major surgical procedure, which can result in serious complications, including hemorrhage, perforated uterus, infection, menstrual disturbances, sterility and miscarriage and prematurity in subsequent pregnancies; and that abortion may leave essentially unaffected or may worsen any existing psychological problems she may have, and can result in severe emotional disturbances.

(6) That numerous public and private agencies and services are available to provide her with birth control information and that her physician will provide her with a list of such agencies and the services available if she so requests.

(7) That numerous public and private agencies and services are available to assist her during pregnancy and after the birth of her child, if she chooses not to have the abortion, whether she wishes to keep her child or place him or her for adoption, and that her physician will provide her with a list of such agencies and the services available if she so requests.

(C) At the same time the attending physician provides the information required by paragraph (B) of this Section, he shall, at least orally, inform the pregnant woman, and one of her parents or her legal guardian whose consent is required in accordance with Section 1870.05(B) of this Chapter, of the par-

ticular risks associated with her own pregnancy and the abortion technique to be employed including providing her with at least a general description of the medical instructions to be followed subsequent to the abortion in order to insure her safe recovery, and shall in addition provide her with such other information which in his own medical judgment is relevant to her decision as to whether to have an abortion or carry her pregnancy to term.

(D) The attending physician performing or inducing the abortion shall provide the pregnant woman, or one of her parents or legal guardian signing the consent form where applicable, with a duplicate copy of the consent form signed by her parents or her legal guardian where applicable, in accordance with Paragraph (B) of this Section.

INTRODUCTION AND SUMMARY OF ARGUMENT

Although many of the questions presented by this case are of substantial interest to the APA, this *amicus* brief will address only the issues raised by questions (3) and (4) in the petition for *certiorari*.[1] Those questions, which deal with what must be said, and by whom, in the context of pre-abortion counseling, are of particular interest to psychologists because counseling is an integral component of the functions psychologists are trained to perform, and is one of the four recognized specialty areas of professional psychology.[2]

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[1] "(3) Can state require physician personally to inform woman of facts relating to her pregnancy, abortion procedure, fetal development, and agencies available to assist her? (4) Can state require physician personally to counsel patient with respect to risks and technique of abortion prior to performing abortion?" 50 U.S.L.W. 3429 (Nov. 24, 1981).

[2] The four areas are clinical psychology, counseling psychology, industrial/organizational psychology, and school psychology.

The APA wholeheartedly agrees that no abortion should be performed without the informed consent of the pregnant woman, and strongly endorses pre-abortion counseling to ensure that consent is informed, and to ensure that a trained professional will be available to discuss any psychological or related problems the woman might have.

To that extent, the APA supports the counseling and informed consent objectives embodied in Akron Ordinance § 1870.06(A). Our concern is not with those objectives, but with the rigid and counter-productive means the Akron City Council has chosen to achieve them. In our view, requiring clinics to provide the same blanket information to every pregnant woman, rather than to provide for each woman whatever information is individually appropriate to her particular needs, is inconsistent with basic principles of effective counseling and will hinder, rather than promote, informed consent. Similarly, requiring that the necessary information be conveyed by the "attending physician," rather than by an individual trained to perform counseling functions, even if the physician has no knowledge or experience in counseling principles and techniques, will hinder, rather than promote, informed consent.

The APA believes that §§ 1870.06(B) and (C) of the Akron Ordinance prevent the individualized counseling that is needed to obtain truly informed consent, interfere with professional judgment, and unduly burden a pregnant woman's constitutional right to make decisions concerning her pregnancy.

ARGUMENT

I. EFFECTIVE COUNSELING IS A SKILL WHICH REQUIRES SPECIALIZED KNOWLEDGE AND EXPERIENCE AND ADHERENCE TO RECOGNIZED PRINCIPLES AND TECHNIQUES, INCLUDING RESPECT FOR THE WIDELY VARYING NEEDS OF INDIVIDUAL CLIENTS.

A. Counseling Is A Recognized Professional Discipline.

The Akron City Council apparently assumed that counseling is something which anyone, or at least any "attending physician," can do. But that is not so. Although most professional psychologists who provide services to clients are trained in counseling techniques, counseling is a sufficiently complex subarea of psychology that it has been formally established by the APA as one of the four recognized specialty areas of professional psychology. The APA has adopted *Specialty Guidelines for the Delivery of Services By Counseling Psychologists* (hereafter *"Guidelines"*)[3] which delineate the standards that must be met before a psychologist can claim to specialize in counseling psychology.

Counseling psychological services are directly relevant to the decisions women, including minor women, must make in the abortion context because they "are intended to help persons . . . develop a variety of problem-solving and decision-making capabilities," and are used by persons "of all age groups." *Guidelines*, Definitions, B.[4]

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[3] 36 AMERICAN PSYCHOLOGIST 652 (1981).

[4] "Counseling psychological services refers to services provided by counseling psychologists that apply principles, methods, and procedures for facilitating effective functioning during the life-span developmental process. In providing such services, counseling psychologists approach practice with a significant emphasis on positive aspects of growth and adjustment and with a developmental orientation. These services are intended to help persons acquire or alter personal-social skills, *improve adaptability to changing life demands*,

Guideline 1.5 requires counseling psychologists to "maintain current knowledge of scientific and professional developments to preserve and enhance their professional competence." That is not an easy task because the literature relevant to the field of counseling is large and growing.[5]

B. To Be Effective, Abortion Counseling Must Be Individually Tailored To Each Woman's Particular Needs.

Guideline 2.2.3 requires counseling psychologists to adhere to the APA's *Ethical Principles of Psychologists.*[6] A central principle of the Ethical Principles is that psychologists treat people as individuals, with full respect for their individual differences: "Psychologists recognize differences among people, such as those that may be associated with age, sex, socioeconomic, and ethnic back-

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enhance environmental coping skills, and *develop a variety of problem-solving and decision-making capabilities.* Counseling psychological services are used by individuals, couples, and families of all age groups to cope with problems connected with education, career choice, work, *sex, marriage, family,* other social relations, health, aging, and handicaps of a social or physical nature." *Guidelines,* Definitions, B. (emphasis added).

Other guidelines require counseling psychologists to know about and assist their clients in using relevant human services in their communities, including "health resources" and "family-service" agencies (Guideline 2.2.5); to maintain cooperative relationships with "professionals in other fields" (Guideline 2.2.6); and to make "their services readily accessible to users in a manner that facilitates the users' freedom of choice" (Guideline 3.1, Interpretation).

[5] The APA publishes a bimonthly JOURNAL OF COUNSELING PSYCHOLOGY which covers theory, research and practice concerning counseling, emphasizing the results of empirical studies about counseling processes and interventions. Other counseling-related journals include THE COUNSELING PSYCHOLOGIST, THE JOURNAL OF CONSULTING AND CLINICAL PSYCHOLOGY, PROFESSIONAL PSYCHOLOGY, PERSONNEL & GUIDANCE JOURNAL, JOURNAL OF COLLEGE STUDENT PERSONNEL, and VOCATIONAL GUIDANCE QUARTERLY.

[6] 36 AMERICAN PSYCHOLOGIST 633 (1981).

grounds." *Ethical Principles*, 2d. The importance of respect for "individual differences" is also reflected in the APA's Criteria for Accreditation of Doctoral Training Programs and Internships in Professional Psychology.[7]

Empirical studies have shown that women find pre-abortion counseling to be quite helpful to them. One study, for example, reported that 86% of the women studied "felt that the counseling was helpful to them." [8]

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[7] II. *Cultural and Individual Differences*

As a science and profession, psychology deals with the full range of human variability. It follows that social responsibility and respect for cultural and individual differences are attitudes which must be imparted to students and trainees and be reflected in all phases of the program's operation: faculty recruitment and promotion, student recruitment and evaluation, curriculum, and field training. Social and personal diversity of faculty and students is an essential goal if the trainees are to function optimally within our pluralistic society. Programs must develop knowledge and skills in their students relevant to human diversity such as people with handicapping conditions; or differing ages, genders, ethnic and racial backgrounds, religions, and life-styles; and from differing social and individual backgrounds. These principles are embodied and elaborated in the specific guidelines and criteria that follow . . . APA COMMITTEE ON ACCREDITATION, ACCREDITATION HANDBOOK (1980).

Other organizations have published standards governing counseling, including counseling in the abortion context. *See, e.g.*, PLANNED PARENTHOOD FEDERATION OF AMERICA, MANUAL OF MEDICAL STANDARDS AND GUIDELINES: PREGNANCY AND ABORTION COUNSELING 21-23 (1977); and American Public Health Association, *Recommended Program Guide for Abortion Services*, 70 J. OF THE AMERICAN PUBLIC HEALTH ASSOCIATION 652 (1980).

[8] Smith, *A Follow-Up Study of Women Who Request Abortion*, 43 AMERICAN J. OF ORTHOPSYCHIATRY 574, 583 (1973):

> The women frequently expressed appreciation for the help they had received from PCS prior to abortion. Eighty-six percent of the women felt that the counseling was helpful to them. Most frequently mentioned were the emotional support provided by the counselor and the information given regarding the abortion procedure. Only seven percent of the women did not feel that counseling was helpful to them.

But some women found counseling much more helpful than did others: "Those who found counseling least helpful were married or older single women who felt they had adequate information and were receiving emotional support from husband or friends. Younger women and those who had not confided in anyone regarding the pregnancy found the counseling of most value." [9]

Age is only one of the important variables that must be considered if the counseling is to be effective.[10] Another very important variable is the duration of the pregnancy. "It is also important to differentiate responses to first- and second- trimester abortions. Research has shown that women undergoing second-trimester abortions have more negative reactions than those having abortions

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[9] *Id.*

[10] *See, e.g.*, Adler, *Sex Roles and Unwanted Pregnancy in Adolescent Adult Women*, 12 PROFESSIONAL PSYCHOLOGY 56 (1981):

> A number of correlates of responses to abortion have been found. On the average, younger women, single women, and Catholic women react more negatively (Adler, 1975; Osofsky & Osofsky, 1972; Payne, Kravitz, Notman, & Anderson, 1976). Women with a history of previous psychiatric problems are at relatively greater risk of developing postabortion problems (Ewing & Rouse, 1973). Also at risk are women who feel coerced into terminating their pregnancy either from pressure from parents or partner or because of medical problems (e.g., Simon, Senturia, & Rothman, 1967). In one of the new longitudinal studies, Payne et al. (1976) identified seven factors that predicted difficulty in working through conflicts associated with abortion: (a) prior history of mental illness; (b) immature interpersonal relationships; (c) unstable. conflicted relationship with one's partner; (d) history of negative relationship with one's mother; (e) ambivalence regarding abortion; (f) a religious or cultural background hostile to abortion; and (g) single status, especially if one has not borne children.

Although post-abortion problems can occur, particularly if the counseling is inadequate, the overwhelming majority of women do not experience such problems. *See* TAN [text and note] n.28, *infra*.

at earlier stages of pregnancy." [11] These and other studies confirm the obvious but critically important fact that pregnant women approach the possibility of abortion with widely varying backgrounds, attitudes, levels of knowledge and familial and social support systems. To be effective and to ensure "informed" consent, the *content* of the counseling must be tailored to those individual differences and needs, and the individual providing counseling must be able to recognize those differences and the modifications of content they require.

Other studies show that the *form* of the counseling is also quite important, and that counselors must have the knowledge and freedom to modify counseling techniques, where appropriate. For example, one study found "an interaction of treatment with age. Younger women reacted better to the abortion after receiving group rather than individual counseling. Older women showed more favorable responses to abortion when counseled individually." [12]

In short, counseling is a complex process. It is a recognized professional speciality which requires specialized

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[11] Adler, *Psychosocial Issues of Therapeutic Abortion, in* D. TOURQS, (ed.), PSYCHOSOMATIC OBSTETRICS AND GYNECOLOGY 165 1980). *See, to the same effect,* Kahn-Edrington, *Abortion Counseling,* 8 THE COUNSELING PSYCHOLOGIST 37, 38 (1979).

[12] Adler, *Abortion: A Social-Psychological Perspective,* 35 J. OF SOCIAL ISSUES 100, 102 (1979). Similar results have been found with respect to men. Gordon, *Efficacy of a Group Crisis-Counseling Program for Men Who Accompany Women Seeking Abortions,* 6 AMERICAN J. OF COMMUNITY PSYCHOLOGY 239, 245 (1978): "In the present study the results indicate that a short 2-hour group-counseling session is an effective means of helping the men who accompany women seeking legal abortions to deal with their own personal crises . . . . A secondary finding shows that the counseling sessions are more effective in A-State reductions for the younger counselees. It seems that more efficacious means of helping the older men, such as individual counseling sessions, a more detailed information sheet concerning abortion, or a video tape of the clinic and its procedures, might be explored."

knowledge and techniques, and the freedom to apply that knowledge and those techniques in the manner best suited to the individual characteristics and needs of individual clients. It has been shown that, if done properly, counseling can produce positive results: "Some physicians have said that when they are performing abortions they can often tell who has received counseling and who has not. This is reflected in how tense or relaxed the woman is. Tension, in turn, affects the difficulty of performing the abortion and the degree of pain experienced." [13]

Also, counseling may be effective in encouraging women to return for post-abortion check-up: "94 of 99 women who received counseling returned to the hospital for check-up while only 60 of 99 uncounseled women did so. Return for follow-up could reduce the incidence of complications as well as provide further information about and encouragement for contraceptive use." [14]

On the other hand, it has been noted that communication of negative attitudes by hospital personnel can contribute directly to the incidence of post-abortion guilt, remorse and depression.[15]

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[13] Adler, *supra* n.12 at 108. *See also, id.* at 107: ". . . a woman's reaction to abortion may be influenced by whether or not she receives counseling and by the type of counseling she receives."

[14] Adler, *supra* n.12, at 108-109.

[15] Marder, *Psychiatric Experiences With a Liberalized Therapeutic Abortion Law*, 126 AMERICAN J. OF PSYCHIATRY 1230 (1970). *See also*, Notman & Nadelson, *Reproductive Crises*, in A. BRODSKY & R. HARE-MUSTIN, (eds.), WOMEN IN PSYCHOTHERAPY 313 (1980) *citing* Marder, *supra*. For other studies of the effects of abortion counseling, *see* Rutledge, *The Effect of Counseling on University Women Requesting Abortion*, DISSERTATION ABSTRACTS INTERNATIONAL 3383A (Univ. Microfilms No. 07435) (1978); Kay, *An Evaluation of the Long Range Aspects of Abortion Services in Chicago, Illinois: An Interdisciplinary Approach*, DISSERTATION ABSTRACTS INTERNATIONAL 4807A (1976) (Univ. Microfilms No. 75-29, 673); Dauber, Zalar & Goldstein, *Abortion Counseling and Behavioral Change*, 4 FAMILY PLANNING PERSPECTIVES 23-27 (1972);

C. The Trial Testimony Acknowledged That Physicians Often Lack the Knowledge and Skills Needed For Effective Abortion Counseling.

The testimony in the District Court confirmed two points: (1) effective abortion counseling requires specialized knowledge and skills which must be tailored to the differing needs of individual women; and (2) "attending physicians" often do not possess that knowledge and those skills.

Adele Hofmann, M.D., Director of the Adolescent Medical Unit at New York University, for example, testified that "counselors should be trained and have a body of knowledge and set of skills, but that the specific discipline by which they come [to] that or through that is not as important as their ability to relate to teenagers." [16] She did not think having an M.D. degree should be a prerequisite for abortion counselors, because the "practical point is that few physicians are trained, and many other people are better trained." [17] She stressed that generalized rules for abortion counseling are inadequate because counseling "is so individualized." [18] And she concluded that "to be honest with you, I think that probably the physician, in his preoccupation with organic needs, is

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and *see* Scott, *Possible Guidelines for Problem Pregnancy Counseling*, 23 PASTORAL PSYCHOLOGY 41-49 (1972); Joffe, *What Abortion Counselors Want From Their Clients*, 26 SOCIAL PROBLEMS 112 (1978); Potts, *Counseling Women With Unwanted Pregnancies*, in F. HASELKORN, (ed.), FAMILY PLANNING 267-280 (1971).

[16] *Transcript* (Vol. III), at 152. Dr. Hofman has had "considerable experience in training people for counseling," *id.* at 130, and has "written a number of books and a number of articles in the area of adolescent health care, adolescent sexuality, in counseling adolescents, and a variety of aspects of that sort." *Id.* at 103. Citations are to the transcript because the parties are using the deferred joint appendix authorized by Rule 30(4) of the Rules of this Court.

[17] *Id.* at 154.

[18] *Id.* at 147.

probably the least well equipped of professional and paraprofessional persons to deal with counseling effectively." [19]

Felix P. Heald, M.D., Professor of Pediatrics and Director of the Division of Adolescent Medicine at the University of Maryland, agreed, particularly when minors are involved, that abortion counselors should have "thorough knowledge of the psychological and the biological characteristics of the adolescent, and thorough knowledge of the counseling." [20] He also concluded that "some counselors are much better counselors than physicians," and that "some nonphysicians are much better than physicians in gathering information from teenagers." [21]

Jay Katz, a physician on the faculty of the Yale Law School and one of the foremost authorities on informed consent, agreed that "doctors, both by the nature of their training and by the nature of the economic pressures and time pressures that they are under, generally do not take the time to inform, and what seems to be evolving—it surely has evolved in our community that physicians and surgeons employ paramedical personnel to do a great deal of the preliminary informing process." [22]

Amicus is not suggesting that physicians can never provide effective abortion counseling. If they have received appropriate training, physicians can make excellent counselors, as can psychologists, nurses, social workers, and others. But effective counseling does require specialized training, and *ordinarily*, physicians have not received that training. Unlike physicians, who rarely

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[19] *Id.* at 131. Dr. Hofmann also noted that physicians are often under pressure to work fast and see many patients, which decreases their ability to be effective counselors. *Id.* at 153.

[20] *Transcript* (Vol. II), at 109. See to the same effect, *id.* at 90. Dr. Heald "was trained in counseling earlier in [his] career." *Id.* at 115.

[21] *Id.* at 109.

[22] *Transcript* (Vol. IV), at 130-131.

receive such training, most doctoral level professional psychologists have received intensive training in interpersonal dynamics and counseling techniques, and most of them would be qualified to provide effective abortion counseling.

II. SECTIONS 1870.06(B) AND (C) OF THE AKRON ORDINANCE PREVENT EFFECTIVE COUNSELING, INTERFERE WITH PROFESSIONAL JUDGMENT, AND UNDULY BURDEN A WOMAN'S CONSTITUTIONAL RIGHT TO MAKE DECISIONS CONCERNING HER PREGNANCY.

As *amicus* showed in Point I, effective counseling requires special training and skills, but the Akron Ordinance does not allow physicians the discretion to delegate the sensitive task of counseling to those who are better qualified to provide it. The Ordinance also deprives physicians of discretion to decide what to discuss with their patients. As we will now show, by limiting professional discretion in these two ways, the Ordinance unduly burdens the woman's constitutional right to make decisions concerning her pregnancy.

Section 1870.06(B) and (C) violate the cardinal principle of effective counseling. Instead of tailoring the information communicated to each woman to meet her particular needs, those sections require that the *same* information be given to *all* women, regardless their individual wishes or needs. A forty year old lawyer and mother of three children who has decided, in agreement with her husband and family physician, to terminate her pregnancy early in the first trimester, and who has no ambivalence about that decision, must be given the same rote information as an unmarried fourteen year old high-school drop-out living at home who has reluctantly decided late in the second trimester to accede to pressures from her parents to have an abortion, despite her desire, and

the demand of her boyfriend, that she continue her pregnancy to term.

It is no answer to suggest, as does petitioner (Pet. Br. at 33 and 36), that after giving the required informaton the counselor could perhaps go on to provide more individualized information, because individualized counseling requires professional discretion not only regarding what *to* say, but also regarding what *not* to say. Giving much of the information specified in the Akron Ordinance would actually harm certain clients, and might undermine the trust and confidence that are essential to effective counseling. For example, it could certainly be harmful to a woman impregnated during a violent rape to be told in detail the anatomical characteristics of her fetus, if every reference to the fetus vividly recalls the horror of her experience. If she asks her counselor to avoid that subject, but the counselor nevertheless persists, as the Akron Ordinance requires, it is unlikely that at the end of that recitation the counselor will have earned the trust needed to engage in more individualized counseling. The harm will have been done, and the possibility of useful and effective counseling will have been destroyed.

There was no dispute at trial that communicating certain kinds of information to certain kinds of clients can cause substantial harm, and can impair an effective counseling relationship. Testifying generally about situations in which giving certain kinds of information would actually pose a "health risk," Jay Katz, M.D., referred to

> . . . studies that seem to indicate that about anywhere from 11 to 17 percent in reported studies of patients do not wish to know a great deal about what is in store for them, and they feel even angry and psychologically traumatized if they are informed and surely, in such situations as acute distress, like myocardial—like heart attacks, when it is important for the patient to be as tranquil as possible to have an extended discussion about consent to various med-

ical interventions could be detrimental to the patient's welfare.[23]

Dr. Katz then testified that giving *all* patients the same, detailed information required by section 1870.06 (B)(3) would "have a detrimental impact on the informed consent process for a number of reasons."[24] One reason was that failure to respect individual differences and needs could actually result in permanent harm for some women:

> Then, what is also wrong with this section is that it is a requirement for all patients, irrespective of the situation where it is clear to the patient and physician alike that she wants the procedure performed, and the procedure is professionally indicated, and then to burden the patient with this additional detailed information could be frightening. It could, in a sense, leave permanent traumatic memory traces for the rest of her life to know in detail what the doctor imagines the fetus looks like at that particular moment in time, particularly since it is so hard to communicate the things required in the statute effectively and sensitively.[25]

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[23] *Id.* at 106-107.

[24] *Id.* at 111.

[25] *Id.* at 112-113. It is hard to communicate that information effectively and sensitively because complying with the ordinance:

> . . . would require the doctor to practically disclose a great deal about all that is known about embryology anatomy to the patient. The fetus develops very rapidly in the early months of gestation, and since one can never be absolutely sure within days as to what the developmental stage of the fetus is, so much would have to be told about tactile sensitivity, limb development, heart function, et cetera, that an information overload would be presented to the patient, and from psychology, we know that when too much information is presented, the person just cannot digest it.

Id. at 111-112.

Dr. Felix P. Heald agreed, and testified that the information contained in section 1870.06(B)(3) ". . . would be a punitive and cruel statement to read to a teenager . . . . I think it is a harsh statement that serves no particular end, other than a negative one . . . . Again, I think it is because of characteristics of the adolescent, the emotional, the developmental characteristics; particularly for the younger teenager. This would be inappropriate, highly inappropriate." [26]

Even the expert witnesses called by defendants agreed that there are circumstances in which automatically giving all of the information specified in the Akron Ordinance could harm individual women.[27] And yet, that is what the ordinance mandates.

The problem is compounded because much of the information which the ordinance requires to be given is inaccurate or seriously misleading. The respondents will address this point more fully. *Amicus* simply wishes to note, in passing, the claim in § 1870.06(b)(5) "that abortion may leave essentially unaffected or may worsen any existing psychological problems she may have, and can result in severe emotional disturbances." This statement is seriously misleading because a great many empirical studies have shown that abortion rarely causes or exacerbates psychological or emotional problems. To

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[26] *Transcript* (Vol. II), at 88. Dr. Heald expressed similar reservations about §§ 1870.06(B)(4) and 1870.06(B)(5). *Id.* at 88, 89. *See also* the counseling guidelines published by the American Public Health Association, *supra* n.7: "Counseling should not be done in such a way as to increase the patient's anxiety by requiring vivid descriptions or pictures of fetal development . . . . The information must not include inaccurate statements." 70 J. OF THE AMERICAN PUBLIC HEALTH ASSOCIATION 652, 654 (1980).

[27] *E.g.*, Seguin, *Transcript* (Vol. VII), at 87-88; Sim, *Transcript* (Vol. VII), at 83-84; Wilkie, *Transcript* (Vol. IX), at 66; Schmidt, *Transcript* (Vol. X), at 53.

the contrary, the great majority of women who have had an abortion express feelings of relief.[28]

More individualized counseling tacked on at the end of this recitation of potential problems will not eliminate the unnecessary anxiety that is created thereby. If the counselor says "I am required by law to tell you that abortion is a major surgical procedure, which can result in serious complications," and then recites the required list of complications, will the anxiety that such a recitation creates disappear if the counselor then adds, "but don't worry, it's not really a major procedure and I don't think those things will happen to you"? That kind of "more individualized" counseling forces the woman, already in an anxiety provoking situation, to weigh the credibility of her elected representatives against the credibility of a counselor she may never have met before.

In light of the foregoing, if they were free to exercise professional judgment and discretion, many physicians would choose, in individual cases, not to communicate much of the information contained in § 1870.06(B). Similarly, if they were free to exercise professional judgment and discretion, many physicians, particularly those who have little or no knowledge of

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[28] *E.g.*, Peck & Marcus, *Psychiatric Sequelae of Therapeutic Interruption of Pregnancy*, 143 J. OF NERVOUS AND MENTAL DISEASE 417 (1966); Patt, Rappaport, & Barglow, *Follow-up of Therapeutic Interruption of Pregnancy*, 20 ARCHIVES OF GENERAL PSYCHIATRY 408 (1969); Senay, *Therapeutic Abortion: Clinical Aspects*, 23 ARCHIVES OF GENERAL PSYCHIATRY 408 (1970); Whittington, *Evaluation of Therapeutic Abortion as an Element of Preventive Psychiatry*, 126 AMERICAN J. OF PSYCHIATRY 1224 (1970); Brody, Meikle & Gerritse, *Therapeutic Abortion: A Prospective Study*, 109 AMERICAN J. OF OBSTETRICS AND GYNECOLOGY 347 (1971); Osofsky & Osofsky, *The Psychological Reaction of Patients to Legalized Abortion*, 42 AMERICAN J. OF ORTHOPSYCHIATRY 574 (1973); Simon, Senturia & Rothman, *Psychiatric Illness Following Therapeutic Abortion*, 124 AMERICAN JOURNAL OF PSYCHIATRY 97 (1967); Niswander & Patterson, *Psychological Reaction to Therapeutic Abortion*, 29 OBSTETRICS AND GYNECOLOGY 702 (1967).

counseling themselves, would decide that it would be in the best interests of their patients for them to receive counseling from a third party trained in counseling techniques. *See* Point I(C), *supra*. But the Akron Ordinance denies physicians the freedom to exercise that professional judgment.

In many different contexts, this Court has stressed the deference that should be shown to judgments made by qualified professionals. The most recent example is *Youngberg v. Romeo*, —— U.S. ——, 102 S.Ct. 2452 (1982).[29] It is particularly important that professional judgment be unfettered in the abortion context, because in that context the woman necessarily relies on professional judgment in making decisions she has a *constitutional* right to make. Since, in the abortion context, professional judgment is inextricably related to exercise of a constitutional right, legislation which burdens exercise of professional judgment burdens exercise of that constitutional right.

It should not be surprising, therefore, that this Court has repeatedly stressed the importance of professional judgment in the abortion context. Beginning with *Roe v. Wade*, 410 U.S. 113, 165-166 (1972), the Court noted that its decision:

> . . . vindicates the right of the physician to administer medical treatment according to his professional judgment up to the points where important state interests provide compelling justifications for intervention. Up to those points, the abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician.

Even after viability, when the state could otherwise prohibit abortion entirely, the Court made an exception where abortion "is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." 410 U.S. at 165.

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[29] *See also, Parham v. J.R.*, 442 U.S. 584, 607-608 (1979); and *Bell v. Wolfish*, 441 U.S. 520, 544 (1979).

In *Doe v. Bolton*, 410 U.S. 179 (1973), the Court again stressed the importance of giving the physician "the room he needs" to exercise professional judgment.[30]

In *Planned Parenthood Federation of Central Missouri v. Danforth*, 428 U.S. 52, 80 (1976), the Court warned against "restrictions or regulations governing the medical judgment of the pregnant woman's attending physician with respect to the termination of her pregnancy." The Court expressly ruled that "it is not the proper function of the legislature" to define the point at which the fetus becomes viable because that "essentially is a medical concept." *Id.* at 64. As the Court explained: "The time when viability is achieved may vary with each pregnancy, and the determination of whether a particular fetus is viable is, and must be, a matter for the judgment of the responsible attending physician." *Id.* And in accepting as the meaning of "informed consent" the "giving of information to the patient as to just what would be done and as to its consequences," the Court observed that to "ascribe more meaning than this might well confine the attending physician in an undesired and uncomfortable straitjacket in the practice of his profession." *Id.* at 67 n.8.

In *Whalen v. Roe*, 429 U.S. 589, 604 n.33 (1977), the Court cautioned against "placing obstacles in the path of

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[30] The net result of the District Court's decision is that the abortion determination, so far as the physician is concerned, is made in the exercise of his professional, that is, 'best clinical,' judgment in the light of *all* the attendant circumstances. He is not now restricted to the three situations originally specified. Instead, he may range farther afield wherever his medical judgment, properly and professionally exercised, so dictates and directs him . . . . the medical judgment may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient. All these factors may relate to health. This allows the attending physician the room he needs to make his best medical judgment. 410 U.S. at 191, 192 (emphasis in original).

the doctor upon whom she was entitled to rely for advice in connection with her decision." And in *Colautti v. Franklin*, 439 U.S. 379, 387 (1979), the Court canvassed its earlier decisions and stressed once again the "importance of affording the physician adequate discretion in the exercise of his medical judgment."

The Akron Ordinance directly and substantially burdens the exercise of professional judgment and it therefore burdens exercise of the woman's constitutional right. The only remaining question is whether the burden is an "undue" burden. Since there are alternatives that would achieve all of Akron's legitimate objectives, without burdening professional judgment, it is clear that the burden created by the ordinance is unnecessary and undue. For example, Akron could require the physician or other counselor to convey specified information unless, in the counselor's judgment, communicating some or all of the specified information would be inappropriate for a particular woman.[31] Similarly, Akron could establish minimum standards that all abortion counselors, whether physicians or non-physicians, would have to meet. In either event, to ensure a meaningful relationship between the woman and the attending physician, Akron could require the attending physician, in every case, to ask the woman if she feels adequately informed, and to offer to answer or obtain the answer to any remaining questions she might have. In these and other ways, Akron could achieve its entirely legitimate objective of ensuring that each woman will be in a position to give informed consent, without interfering with professional judgment or unduly burdening exercise of the woman's constitutional right to make decisions concerning her pregnancy.

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[31] Of course, although the counselor should have broad latitude in exercising professional judgment, he or she must always communicate sufficient information to permit informed consent, as required by the constitution and ethical principles.

CONCLUSION

The Judgment of the Sixth Circuit Court of Appeals Finding Akron Ordinance Sections 1870.06(B) and (C) Unconstitutional Should Be Affirmed

Respectfully submitted,

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